No. 14,955

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSEPH BOYD, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT JOSEPH BOYD'S PETITION FOR A REHEARING.

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To the Honorable Albert Lee Stephens, Richard H. Chambers and Stanley N. Barnes, Judges of the United States Court of Appeals for the Ninth Circuit:

Joseph Boyd, one of the appellants above named, hereby respectfully petitions for a rehearing as to him of the above cause decided on April 1, 1957.

Said petition is based on the ground that the opinion and decision of this court is erroneous in each of the following particulars, to-wit:

1. In holding that a distinction exists in the nature and effect of an overt act when involved in the

crime of treason and when such act is involved in the crime of conspiracy.

2. In holding that a distinction exists between substantial and insubstantial overt acts charged in an indictment.

3. In holding that the instructions to the jury were sufficient to advise the jurors they must all agree on at least one of the overt acts charged as having been committed.

4. In failing to pass on important questions of law raised by appellant.

5. In resorting to evidence, incompetent for such purpose, in upholding the sufficiency of the evidence to establish the conspiracy charged.

6. In holding that the refusal to give the admittedly correct instruction as to the unanimity of the jurors was not reversible error.

NO DISTINCTION EXISTS AS TO THE LEGAL AND PROBATIVE EFFECT OF OVERT ACTS IN CASES OF TREASON AND CASES OF CONSPIRACY. THE DEGREE OF CRIMINALITY OF AN OVERT ACT, STANDING ALONE, HAS NOUGHT TO DO WITH ITS BEING AN ESSENTIAL ELEMENT OF A CRIME.

This court has declined to follow the holdings in the treason cases of *Cramer v. United States,* 325 U.S. 1, and *Haupt v. United States,* 330 U.S. 631, stating as follows:

> "First, we say that the overt act of the crime of treason of Article III, § 31 (sic) of the Constitution is a substantial part of the crime. In-

substantial overt acts may qualify to move a garden variety of conspiracy agreement into the zone of crime and away from 'talking' and 'thinking'. Yet such overt acts may fall short of the substance required for a treasonable act. Thus, in a way, treason is sui generis."

Irrespective of the character of the act, an overt act is just as an essential element of the crime of conspiracy as it is of the crime of treason. Being an essential element of each crime, the same law and rules prevail in each case, both as to the duty of the judge to give full and complete instructions and as to the jury being unanimous as to the commission of such overt act.

Article III, Section 3, of the Constitution, defines the crime of treason as follows:

> "Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two witnesses to the same overt Act, or on confession in open Court."

Title 18 U.S.C. Sec. 371, defines a criminal conspiracy as follows:

> "If two or more persons conspire either to commit any offense against the United States * * * and one or more of such persons do any act to effect the object of the conspiracy, * * *."

Two essential elements must exist before either treason or criminal conspiracy can be committed, viz:

a mental activity followed by a physical act, the latter being commonly called an overt act.

In treason the crime consists of a state of mind, a criminal intent followed by a physical act to accomplish such mental determination. (*Kawakita v. United States,* 343 U. S. 717.)

In *Werner v. United States,* 247 Fed. 708, 709, it is held that:

> "In addition to the obviously necessary elements, treason, as thus defined, embraces the existence of both a state of mind and the commission of overt acts * * *."

and to the same effect is the case of *Stephen v. United States,* (6 Cir.) 133 F. 2d 87, 92.

The same two elements are involved in the case of criminal conspiracy—a meeting of the minds of the conspirators followed by the commission of overt acts.

It is immaterial whether the overt acts can be classed as substantial or insubstantial; they are sufficient if done for the purpose of carrying into effect the prior mental determination in treason to give aid and comfort to the enemy and in conspiracy to commit a crime against the United States.

In *Haupt v. United States, supra,* the court held the following (insubstantial) acts to be sufficient overt acts: the accused's saboteur-son lived in the father's house with his knowledge; the accused bought an automobile for his son; he helped his son get a job in a factory where they were manufacturing Norden Bomb Sights.

Thus, the attempt of this court to distinguish between overt acts in cases of treason and such acts in cases of conspiracy is without support in the law. In both cases the jurors must all agree that a particular overt act was committed before a guilty verdict can be upheld.

IT IS NOT SUFFICIENT THAT JURORS ALL AGREE THAT AN ACCUSED WAS GUILTY, THEY MUST ALL AGREE THAT THE CRIME WAS COMMITTED BY THE ACCUSED COMMITTING THE SAME IDENTICAL ACTS RESULTING IN GUILT.

Where a particular crime can be committed by the doing of various acts it is not sufficient that the jurors all agree as to the guilt of the accused, the jurors must all agree on the same identical acts having been committed, otherwise there is no unanimous verdict as contemplated by the Constitution.

Where some jurors find the crime charged was committed by the accused doing certain acts and other jurors find that the crime charged was committed by the accused doing a different set of acts, there is no unanimous verdict and no valid conviction. If it cannot be ascertained from the record that the same acts were found to have been committed by all the jurors, then the verdict is void and the conviction must be reversed. (See the *Cramer* and *Haupt* cases, *supra*; *Stromberg v. California,* 283 U. S. 359, 368; *Williams v. North Carolina,* 317 U. S. 287, 292.)

THE INSTRUCTIONS DID NOT ADVISE THE JURORS THEY MUST ALL AGREE ON AT LEAST ONE OVERT ACT.

The opinion herein admits that "The requested instruction (as to unanimity of the jury as to one overt act) was proper. We think its refusal was not error; at least not reversible error." In support of this proposition the opinion sets forth instructions given the jury, which this court states were sufficient to advise the jurors that they must all agree as to one overt act. We quote these instructions from the opinion with running comment thereon.

> "1. You must find * * * Fourth, that one of the conspirators (after the formation of the conspiracy) knowingly committed at least one of the overt acts charged in the indictment."

This does not tell the jurors that they must all agree as to the commission of one of the overt acts charged; it merely tells each individual juror before he can join in a verdict of guilty he—as an individual—must be satisfied that one overt act as charged was committed in furtherance of the conspiracy.

> "2. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, the defendant has the right to rely upon a failure of the prosecution to establish such proof."

This instruction has nothing to do with the unanimity of the jury as to at least one of the overt acts charged. Under this instruction the jurors were advised that the failure of any defendant to take the

stand did not justify a conviction if the prosecution failed to establish the crime charged, leaving to each juror the right to determine whether the conspiracy had been established and whether such juror found that any one of the 14 overt acts charged had been committed.

> "3. You must consider each count separately as though each was set forth in a separate indictment, and in order to convict or acquit the defendant on any count, you must reach a unanimous verdict as to each count. It will take all twelve of you to convict or acquit, as the case may be, on each count."

This instruction merely told the jurors that they must all agree that the defendant was guilty before they could return a guilty verdict. It did not advise the jury that they must all agree that the defendants did conspire and that they must all agree at least on one of the overt acts charged. Under this instruction the jurors were warranted in returning a verdict of guilty where all jurors found that the conspiracy had been entered into and some jurors found that one, two or three of the overt acts had been committed and others found that other and distinct overt acts had been committed.

> "4. It is not necessary, as I have indicated, that all the overt acts charged be proved, but it is necessary that at least one of these be proved and that it be shown to have been in furtherance of the object of the conspiracy. Other overt acts than those charged may be given in evidence, but proof of one of those charged in the indictment is indispensible."

The foregoing is a correct abstract statement of the law; but it does not tell the jurors they must all agree on at least one overt act having been committed in furtherance of the conspiracy. It still left to each juror the right to select the overt act which he thought had been committed in furtherance of the conspiracy, leaving to other jurors the right to select other and different overt acts as having been so committed.

In other words, at no place did the court instruct the jurors that they must all agree on the commission of at least one of the overt acts charged.

The opinion concedes that all overt acts relating to the activities of Constance Bell (Cindy) after she left Arizona had nothing to do with Boyd or the conspiracy charged. Thus, various acts were submitted to the jury which, as a matter of law, could not have been overt acts in furtherance of any conspiracy to which Boyd was a party.

In *Haupt v. United States, supra,* it was held that where several overt acts were charged, some of which were not established by the evidence, that the cases must be reversed where the evidence did not establish each and all of the overt acts charged, in the absence of special verdicts:

> "As the acts here were pleaded to in a single count, and the jury were instructed that they could convict on any one, we would have to reverse if any act were insufficient or insufficiently proved."

The opinion stresses the fact that no motion was made to withdraw certain of the overt acts from the

jury's consideration. The question is not whether certain acts should not have been submitted to the jury, but whether the court should have instructed that the jurors must all agree on at least one overt act having been committed in furtherance of the conspiracy charged.

The opinion emphasizes the fact that instructions should be concise and that "brevity should be a fetish." But neither conciseness nor brevity can take the place of the giving of proper judicial guidance to the jury by the court. Without full and proper judicial guidance any verdict of guilt returned by a jury deprives the accused of a fair trial and due process of law.

In *Bollenbach v. United States,* 326 U.S. 607, the Supreme Court states:

> "A conviction ought to rest on an equivocal direction to the jury on a basic issue."

Here, the requested instruction as to unanimity of the jurors related to a basic issue in the case. The refusal to instruct on such a basic issue is akin to an equivocal or erroneous instruction on such issue.

The opinion in the *Bollenbach* case closes with these words:

> "* * * it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiable engendered by the dead record, for *ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.*" (Italics added.)

Earlier in the *Bollenbach* case the Supreme Court states:

> "* * * the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

In a criminal case the court must instruct the jury on all essentials of law involved, whether or not it is requested so to do. (*Samuel v. United States,* (9 Cir.) 169 F. 2d 787, and cases therein cited.)

Here, it was the duty of the trial judge to instruct that the jurors must all agree on at least the commission of one of the overt acts before they could return a guilty verdict. A failure to so instruct or even the giving of an equivocal instruction on such a basic issue constitutes a lack of "appropriate judicial guidance" and results in the verdict of guilt having been arrived at contrary "to the procedures and standards appropriate for criminal trials in the federal courts."

To sum up on this point. The verdict herein may have been the result of the jury all agreeing that Boyd was guilty of the conspiracy charged without any two or more of the jurors having agreed that the same overt act in furtherance thereof had been committed. In these circumstances the judgment must be reversed.

INSUFFICIENCY OF THE EVIDENCE.

The opinion herein sets forth 8 events which it is held establish appellant Boyd's guilt. We quote the same with comments thereon.

> "1. The fact that before Cindy went with Judy in 1953 to Arizona Boyd and Ege knew each other.
>
> 2. Efforts of Ege in September, 1953, to 'place' Cindy somewhere.
>
> 3. Ege dispatches Cindy, transportation paid, to Scottsdale along with the above-mentioned Judy."

Mere association or acquaintance between two parties is no proof of conspiracy.

That Ege made efforts in September to place Cindy somewhere is conclusive that up to that time no conspiracy existed of which Boyd was a member to transport Cindy from California to Arizona.

That Ege paid Cindy's transportation so she could go with Judy to Arizona, again refutes any conclusion that there was a conspiracy, to which Boyd was a member, that such transportation take place. The evidence establishes that without the co-operation of Ege the girl Judy had made independent plans to go to Arizona; the sending Cindy along with Judy was no part of any conspiracy charged in the indictment, nor is there any evidence that such action was the result of any agreement with Boyd.

> "4. Boyd at Scottsdale received Cindy and puts her to work for a week or two in the trade at his brothel."

5. Boyd's verbal act at Scottsdale in soliciting customers for his house when he stated that he was *bringing* over two women from California."

There is no evidence in the record that Boyd was *bringing* or any statement by him that he was *bringing* any women from California. (See R. 212.)

The arrival of Cindy and Judy at Scottsdale could have been the result of transactions to which Boyd had no part and no knowledge until the girls had left California.

"7. Evidence that Boyd did make many calls to San Francisco from his motel late in September, 1953, and in October.

8. Boyd's subsequent admissions that he had telephoned Ege at San Francisco from Phoenix or Scottsdale, apparently around the time Cindy was going to and she was working for him in his house at Scottsdale."

There is no evidence as the nature of any telephone conversations had by Boyd and Ege. This matter is left in the realm of speculation.

Boyd's extrajudicial admissions, made long after the termination of the alleged conspiracy cannot be used to establish the conspiracy. Such matter is only admissible after there has been independent proof of the conspiracy. (See Appellant's Op. Brief, p. 31.)

THE OPINION FAILS TO CONSIDER AND DOES NOT PASS UPON IMPORTANT QUESTIONS OF LAW RAISED BY APPELLANT BOYD.

On his appeal Boyd raised the following important questions of law: (1) That statements and acts of alleged co-conspirators said or done out of Boyd's presence could not be used to establish the corpus delicti of the offense of conspiracy (Boyd's Op. Br. pp. 28 to 34.) Also that the extrajudicial admissions of Boyd could not be used for any such purpose. (Op. Br. pp. 31 to 34.)

Not only has this court failed to discuss or pass upon these questions, but the opinion has disregarded such well established law and proceeded in direct conflict therewith.

Thus, the opinion resorts to acts and statements of Ege out of Boyd's presence as proof of the conspiracy; it resorts to acts of the girls Cindy and Judy out of Boyd's presence to establish the conspiracy, and it resorts to extrajudicial admissions of Boyd to establish the conspiracy. None of these matters can be used for such purpose.

There must be independent proof of the conspiracy before the acts or declarations of any alleged co-conspirator, said or done out of the accused's presence, can become competent evidence against the accused. In the absence of such independent evidence there is no legal or sufficient proof of the conspiracy.

Glasser v. United States, 315 U.S. 60;
Minner v. United States, 57 F. 2d 506;
Dolan v. United States, 123 F. 2d 52;

Thomas v. United States, 57 F. 2d 1039;
Nibbelink v. United States, 66 F. 2d 178.

It is also the law that the conspiracy cannot be established by the extrajudicial statements or admissions of the accused; that such statements are only admissible where there is independent proof of the conspiracy.

Wynkoop v. United States, 22 F. 2d 799;
Mangum v. United States, 289 Fed. 213;
Daesche v. United States, 250 Fed. 566;
Ryan v. United States, 99 Fed. 864;
Goff v. United States, 257 Fed. 294.

On March 30, 1957, this court, with Judge Albert Lee Stephens concurring, decided the case of *Ong Way Jong (Ong) v. United States,* No. 15,178, wherein the law is clearly set forth as follows:

> "However, all this does not prove Ong was dealing in narcotics. Of course, there is a strong suspicion that he was. But there is no proof. Unquestionably, someone supplied the illicit heroin which Wu purchased. Wee was without doubt guilty. But, before one can be proven to be a conspirator and so bound by the admissions of a co-conspirator such as Wee, there must be some evidence produced of a conspiracy and of his connection with the crime. * * * Guilt by association would be the only basis. Ong was constantly with Wee. Wee sold narcotics. Therefore, Ong must have supplied the heroin. This is a classic non sequitur. For it must be remembered that the declarations of Wee to Wu were hearsay as to Ong. He was not present. If proof aliunde has

established a conspiracy, Ong might be bound by the conversation of Wee."

Later in the opinion this court states:

"The excellent trial judge made the mistake of considering a mass of evidence which was only admissible against Wee. It is an unquestioned rule of law that there must be substantial evidence of a conspiracy before the acts and declarations of a supposed conspirator become admissible against any other defendant, if they are not done or said in his presence. This is because such acts are transactions between third parties, with which the other defendant has not shown by other evidence to have a connection. These matters are hearsay as to him."

THE COURT HAS INJECTED A FALSE ISSUE INTO THE CASE.

Throughout the opinion are statements to the effect that Boyd contended the court erred in not submitting to the jury special verdicts on the 14 overt acts. Boyd has never raised such a contention. His sole complaint on this issue was that the court erred in not instructing the jurors they must all agree on at least one of the overt acts. His only reference to special verdicts was to emphasize the point that in the absence of special verdicts there was no way of ascertaining what particular act or acts the jurors agreed upon or whether there was such a unanimity of findings.

For the foregoing reasons a rehearing should be granted.

Dated, San Francisco, California
April 29, 1957.

LEO R. FRIEDMAN,
Attorney for Appellant and Petitioner Joseph Boyd.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for Joseph Boyd, appellant and petitioner in the above cause and that in my judgment the foregoing Petition for a Rehearing is well founded in point of law as well as in fact and that said Petition for Rehearing is not interposed for delay.

Dated, San Francisco, California,
April 29, 1957.

LEO R. FRIEDMAN,
Counsel for Appellant and Petitioner Joseph Boyd.